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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ... [redacted] 277

HARRY G. SILVERSTEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the order of the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 35a)* is officially reported at 237 F. Supp. 446. The opinion of the United

* Parenthetical references are to the Appendix in the Court of Appeals.

States Court of Appeals for the Second Circuit, decided May 11, 1965, has not yet been officially reported, but is reproduced in the appendix hereto beginning at page 1a.

Jurisdiction

The appeal to the United States Court of Appeals for the Second Circuit was decided May 11, 1965. By stipulation of the parties, compliance with the order in the United States District Court for the Southern District of New York is stayed, provided that the petitioner herein file with this Court and serve a petition for a writ of certiorari within thirty (30) days of the isuance of the mandate by the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Sec. 1254(1).

Question Presented

May the government, in the course of a criminal investigation, compel a general partner of a general partnership to produce records of the general partnership in his personal possession over his claim of Constitutional privilege?

Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, arising out of an affirmance by that Court of an order of the United States District Court for the Southern District of New York granting the application and motion of the United States for an order requiring a general partner of a general partnership to produce partnership books and records over his Constitutional objection, and pursuant to an Internal Revenue Service summons issued by a Special Agent under the authority of Section 7602, Internal Revenue Code 1954.

Petitioner, Harry G. Silverstein, is one of the general partners of two general partnerships engaged in the real estate business and known as Motel City B and Motel City C. They are ordinary common law general partnerships. Their business is the renting of certain real estate in New York County. Each owned a lease on land, each leased the land and each collected the rent. Mr. Silverstein was at all relevant times, in personal possession of their books and records (App. 18a).

These partnerships do not differ in any significant way from the host of other general partnerships conducting business in New York City (App. 20a). They have all the attributes of ordinary general partnerships, including full liability of each and every partner for all the debts of the partnership. There is substantial full and equal power on the part of all partners to act on behalf of and bind the partnerships. Any partner can make a lease, negotiate or change the amount of rent and exercise all partnership prerogatives (App. 20a).

The restriction on alienability of interests is typical of most general partnerships having a partnership agreement and demonstrates the close personal relationships and incapacities of a partner to alter them by injecting strangers into a partner's position of control. All partners have maintained a lively and vital interest in the affairs of the partnerships, have participated in management and have personally attended frequent meetings to establish policy for the guidance of the operation. The delegations of certain duties by some partners to others here is no different from the same delegations found in countless legal, accounting, brokerage and other general partnerships. None of the partners is an impersonal passive investor.

A Special Agent of the Internal Revenue Service is engaged in a criminal investigation of petitioner's personal tax affairs. He served an Internal Revenue Service summons on petitioner, seeking the production of a large quan-

tity of books and records; not only of Motel City B and Motel City C, the two partnerships whose records are the subject of this petition, but of a number of other businesses, in which it was claimed petitioner was involved (App. 16a, 17a). Long before the institution of these proceedings, all the records sought in that summons, other than those of the two general partnerships here involved, were produced and examined by agents of the Internal Revenue Service. Petitioner, a general partner in Motel City B and Motel City C, declined to produce the records of these two general partnerships on the grounds of the Fifth Amendment to the Constitution.

It is believed that the decision below is without precedent and is in error insofar as it enforces, for the first time, process against an individual requiring the production of the records of a general partnership of which he is a member, over this claim of Constitutional privilege.

Accordingly, petitioner seeks a reversal of the decision and order of the United States District Court for the Southern District of New York, dated January 28, 1965, and direction of the entry of an order by that Court declaring that the Internal Revenue Service summons here in question violates the petitioner's Constitutional privilege against self-incrimination and that enforcement of said summons be permanently stayed and enjoined.

POINT I

The records of the general partnership are within the scope of the claim of constitutional privilege made by the general partner who possesses them.

The records are sought by a Special Agent of the Internal Revenue Service. It is by now hornbook law that the function of a Special Agent is to gather evidence to support a criminal prosecution. *Russo* v. *United States,* 241 F. 2d 285 (2nd Cir. 1957); *In Re Daniels,* 140 F. Supp. 322

(S.D.N.Y. 1954); *United States* v. *Wolrich,* 129 F. Supp. 528 (S.D.N.Y. 1955); *United States* v. *Lipshitz,* 117 F. Supp. 466 (E.D.N.Y. 1954); *Idem.,* 132 F. Supp. 519, 521 (E.D.N.Y. 1955).

It is equally beyond dispute that the privilege may be properly asserted before a Special Agent in response to his summons. *In re Turner,* 309 F. 2d 69 (2d Cir. 1962).

All of the authority on the subject is to the effect that general partnership records in the possession of a general partner, are within the scope of that general partner's claim of privilege. *Boyd* v. *United States,* 116 U. S. 616, 29 L. Ed. 746 (1886); *United States* v. *Brasley,* 268 Fed. 59 (W. D. Pa. 1920); *Layman* v. *Webb,* 350 P. 2d 323, 325 (Okla. Cr. 1960); *United States* v. *Linen Service Council of N. J.,* 141 F. Supp. 511 (D.N.J. 1956); *United States* v. *Lawn,* 115 F. Supp. 674, 677 (S.D.N.Y. 1953), approved by implication in the same case; *United States* v. *Giglio,* 263 F. 2d 410, 412 (2d Cir. 1959); see also *United States* v. *Achilli,* 234 F. 2d 797, 806 (7th Cir. 1956); *In re Subpoena Duces Tecum,* 81 F. Supp. 418 (N. D. Cal. 1948). This view also finds support in the treatises which discuss this question. 98 C.J.S., § 448, page 285; 10 Mertens, *Law of Federal Income Taxation,* page 72, § 55A.21 (1958 Callaghan & Co.).

The essence of a general partnership is the personal relationship resulting from the power of the general partner to render any of his co-venturers personally liable by his acts. This power is not present in any other kind of co-venture. This characteristic of general partnerships was recognized in the dissenting opinion of Judge Biggs in the Court of Appeals decision in *United States* v. *White,* 137 F. 2d 24, 26 (3rd Cir. 1943), as the basis for the conclusion that records of a general partnership fall within the scope of the Fifth Amendment privilege. Judge Biggs stated:

> "A member of a partnership may maintain the privilege against self-incrimination in respect to the pro-

> duction of the records of the partnership. The right to choose one's fellow members, the delectus personarum, which is regared as one of the most important and indispensable characteristics of a partnership, is not available to the members of a labor union. Generally, a worker may be admitted to a labor union without the consent of all the members . . . and a member may not be expelled from the union so long as he meets its membership requirements . . ." 137 F. 2d at 27

This dissent was adopted by the Supreme Court of the United States in its reversing decision, *United States* v. *White*, 322 U. S. 694, 88 L. Ed. 1542 (1944).

Thus, for example, restrictions on transferability here do not derogate the personal quality of the relationship. On the contrary, such restriction demonstrates that personal quality, because it excludes strangers as partners, and is a true characteristic of a general partnership. A contrary rule would jeopardize the personal interests and relationships of the other partners by permitting strangers to enter a position in which partners act for and incur liability on behalf of each other.

The District Court (App. 44a), seized on the fact that two or three of the general partners had assigned a portion of their income from the partnership to others, apparently suggesting that these assignees of income had acquired some right in the books and records. It appears to have been the Court's position that there were persons lacking in the personal partnership relationship, whose right in the books and records served to destroy their privileged character in petitioner's hands. This is error since the New York statute expressly states that such an assignment of an income right does not ". . . entitle the assignee . . . to inspect the partnership books . . ." N. Y. Partn. L., Section 53(1).

That the partnerships here in question were private and personal in nature seems clear beyond dispute. Each partner was personally liable for the debts incurred by the partnerships. Each partner had power to bind the other by his acts. And the partnership would be dissolved upon the death, retirement or insanity of any of the partners.

A partnership is *not,* like a corporation, an artificial person created by law, existing independently of the persons who create and control it. It is merely a name by which individuals conduct joint business, and in which their accounts are kept and through which certain established equitable rights in marshalling assets are acquired. *Caplan* v. *Caplan,* 268 N. Y. 445, 447, 448 (1935). To this time, the Courts have uniformly upheld the assertion of the privilege against self-incrimination with respect to the books of general partnerships. The relationship is inherently personal despite the sharing of economic interest with others which is present. To hold otherwise would, contrary to reason and authority, drastically reduce the area in which the privilege has been previously sustained.

POINT II

The *White* case is inapplicable to the general partnership records here in issue.

The government relies heavily on the decision in *United States* v. *White,* 322 U. S. 694, 88 L. Ed. 1542 (1944), for support here. It is quite clear that the decision is inapplicable to the case at bar. It was not the Supreme Court's intention there to lay down broad rules regarding the general scope of the privilege. Indeed, the Court in the *White* case expressly stated:

> "Our attention is directed solely to the right of an officer of a union to claim the privilege . . ." 322 U. S. at 698.

It may be surmised that the statement was evoked as a response to arguments regarding the possible reach of a decision denying the privilege.

The rule of the *White* case should not be plucked from its context and applied indiscriminately to a partnership having very different characteristics from the organization there involved. At most, the Court, would apply the rule there invoked to:

> ". . . unions, religious bodies, trade associations, social clubs . . ." (322 U. S. at 697),

not to partnerships.

In *White,* the organization involved was a labor union in which every member of a class was entitled to membership. The impersonality of such an organization, in which all have the right to join without consent of other members, merely because they do similar work, in which no member may bind another, in which no member assumes the responsibility for the conduct of others, in which there can be no claim of personal ownership or privity by the members in the records or funds of the organizations, and where the life of the organization is not affected by the death or insanity of any of its members, is a far cry indeed from the personally intertwined relationships of the partners of the general partnerships here involved, where each shares liability for the other's acts, where each has control and an active role, and where each has a personal proprietary interest in the books, assets, and funds of the partnership. Cf. *Haywood* v. *United States,* 268 Fed. 795, 801-804 (7th Cir. 1920), distinguishing partnerships from labor organizations for purposes of the privilege.

Because of the foregoing differences, the District Court fell into error in seeking to rely on the *White* case. The organization in that case had thousands of members, among whom there was lacking the *delectus personarum,* ". . . one of the most important and indispensible characteristics of

a partnership . . ." *United States* v. *White*, 137 F. 2d 24, 27 (3d Cir. 1943).

Reliance was similarly misplaced below on *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir. 1963). There, this Court extended the *White* dictum to a limited partnership where there were in excess of 100 partners (as many as 174), and the *delectus personarum* relationship was present only as to three partners, the general partners. In the present case, however, there are, at most, seventeen (17) partners, all of whom are general partners and are therefore in *delectus personarum* (App. 39a).

The *White* case teaches us to distinguish between general partnerships on the one hand and that class of unincorporated associations on the other hand in which records are held in purely representative capacities and in which the various members by virtue of membership do not reach that area of shared property interest, shared obligation and shared action which is tantamount to the creation of an *alter ego* relationship as between them. It is this distinction that Judge Biggs pointed to when he compared that class of unincorporated associations whose records are not within the scope of the privilege to general partnerships. Judge Biggs framed his contrast as follows:

> "Unlike the members of a partnership, the members of a union do not act as agents for each other or assume responsibility for the conduct of the other members. Consequently in fact, there can be no claim of personal ownership or privity by the members of a union in the records of the organization. The books and records of a labor union are no more the personal property of the individual members than are the funds in a union treasury the private and personal funds of the members." (Citations omitted) 137 F. 2d at 28.

The nature of the unincorporated association in the *White* case was so impersonal as to render it substantially

equivalent to an entity separate and distinct from its members.

Indeed, the *White* case did not even involve the question of whether an individual member of an association may assert the privilege with respect to the association's papers on his own behalf, rather than on behalf of the association. Quite obviously, as the Court pointed out, the papers there involved belonged to the organization and not to the individual. 322 U. S. at 704.

Overlooking this, the government relies on the well known *White* language (322 U. S. at 701), so frequently quoted, frequently misquoted, and always quoted out of context. The test contained in that language was clearly addressed to the question of whether *the organization itself and by its officers acting in their official capacity*, was entitled to the privilege. The test was not, as the government misapprehends, directed to the question of whether the individual can assert the privilege, which is the question here. 62 Mich. L. Rev. 526, 529 (Jan., 1964).

The decision in the *White* case requiring the organization to produce its books was supported by the policy requiring supervision and regulation of large public bodies of the kind there involved. 322 U. S. at 700, 701. The issue in this case does not arise out of an attempt on the part of any government agency to regulate or supervise the two instant partnerships. The sole purpose for the production of the books here is the advancement of the criminal investigation of the individual tax responsibility of the petitioner. Therefore, for all these reasons, the *White* case has little, if any, relevance to the instant situation.

POINT III

The first *Silverstein* case is inapplicable to the general partnership at bar.

The government seeks support in the decision in *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir. 1963). But the decision in that case involved only the books and records of limited partnerships ". . . some having over 100 limited partners . . ." (314 F. 2d at 791). Despite the government's attempt to cover both general and limited partnerships with the same "syndicate" umbrella, the opinion in the *Silverstein* case makes it clear that the decision there reached is not applicable to the books of a general partnership.

The decision in the *Silverstein* case rests on the fact that both limited partnerships and corporations are statutory creatures with a statutory privilege afforded to limited partners of absence of personal liability for the debts of the partnership. There, a substantial part of the membership of the organization was not personally liable for the debts of the partnership. N. Y. Partn. L. § 90. The relationship between the limited partners and the organization paralleled to that extent that of stockholders with a corporation. No such parallel exists here. All the partners here are jointly and severally liable for all the debts of the partnership and their entire worldly goods are hostage for such debts. N. Y. Partn. Law, § 26.

The existence, in the *Silverstein* case, of a substantial group of limited partners having no active role in the affairs of the partnership (N. Y. Partn. L., § 96) and without any power to bind it by their acts, or to render other partners personally liable, further heightened the similarity between the limited partnership and the corporation. Stockholders, too, may bind neither the corporation nor their fellow stockholders. Like stockholders,

limited partners are merely passive investors in the business enterprise. N. Y. Partn. L., § 93; *Alley* v. *Clark*, 71 F. Supp. 521 (E.D.N.Y. 1947). Therefore, as in the case of stockholders, there is little reason for concern regarding the identity of limited partners, andd their interrelationship is, therefore, far less personal than in the case of general partners.

The Courts have, on occasion, withheld the privilege from the books and records of statutory creatures on the "implied waiver" or "election" theory. This theory is to the effect that the sovereign having created a purely statutory form for doing business having certain benefits, it has reserved an inquisitorial right which is accepted as displaceing the Constitutional privilege. *Hale* v. *Henkel*, 201 U. S. 43, 74-75, 50 L. Ed. 652 (1906); *Application of Daniels*, 140 F. Supp. 322, 325 (S.D.N.Y. 1956).

Describing the theory as "... the doctrine of submission to governmental supervision ..." (314 F. 2d at 791), the Court of Appeals decision in the *Silverstein* case rests also in part on the theory that limited partnerships are statutory creatures and that the limited liabiliy of members of limited partnerships is a privilege afforded only by statute. Therefore, the Court stated that the choice of this form of business organization:

> "was necessarily an election to submit to *a greater degree of governmental intervention that would be true of a simple common law* partnership, and to more closely approximate the corporate form." (314 F. 2d at 791) (Emphasis supplied)

Here, of course, we have no limited partnerships, no limited liability, no waiver and no election to submit to governmental intervention.

The relevent and material differences between general and limited partnerships are so great as to forbid resolu-

tion of the fundamental Constitutional question raised here under the rule in the first *Silverstein* case, which applies only to limited partnerships.

The Court of Appeals for the Second Circuit stated with respect to the issues presented in the first *Silverstein* case that they were "not free from difficulty" 314 F. 2d at 790. Most respectfully, that decision reaches the furthest limits of the *White* case 62 Mich. L. Rev. 526 (Jan. 1964). Any further extension thereof is wholly without support.

This Court has already long ago held that the scope of the privilege against self-incrimination extends to the records of a general partnership. *Boyd* v. *United States,* 116 U. S. 616, 29 L. Ed. 746 (1886).

The extensive reduction in the scope of the Fifth Amendment's privilege against self-incrimination substantially affects and reduces the civil rights of the petitioner and would compel him to provide evidence which might incriminate him. The decision below is based on the fact of shared commercial interest clearly implying that privacy is absent where shared commercial interest exists. It is, however, a further "stealthy encroachment" on the personal right of an individual citizen guaranteed to him under the Constitution. The decision below is contrary to the admonition which this Court uttered while holding that partnership records are within the scope of the partner's claim of Constitutional privilege:

> ". . . It is the duty of courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta prinipiis.*" *Boyd* v. *United States,* 116 U. S. 635, 29 L. Ed. 746, 752 (1885).

CONCLUSION

For the reasons stated, the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

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